JOHN A. SIBLEY LECTURE*

THE SHAPING OF INTERNATIONAL LAW

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I am glad to be here not only to deliver the John A. Sibley Lecture in Law but also to participate in the ceremonies connected with the dedication of the Dean Rusk Center for International and Comparative Law.***

Dean Rusk is not only a great citizen of Georgia, but also a great citizen of the United States and of the world. Among United States statesmen he distinguishes himself by his appreciation of the importance of the United Nations and the need for the United States to play a leading role in this town meeting of the world. His wisdom and kindness are highly appreciated by all of us who have the privilege of knowing him. Our paths crossed some thirty years ago, and over the years we have met many times as our interests were similar: the United Nations,1 human rights,2 and arms control and disarma-

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*** The Dean Rusk Center for International and Comparative Law was founded in 1977 to facilitate greater efficiency in interactions between business and government activities and between various government activities. The Center works closely with a broad range of business and government entities at the local, state, federal, and international levels to (1) identify specific government-business interactions directly or indirectly affecting international trade and investment that involve unnecessary burdens on business or governmental interests, (2) mobilize university, business, and government resources to develop both theoretical and practical approaches that will substantially reduce such burdens, and (3) facilitate the implementation of such approaches by providing business and government entities with some essential informational and manpower resources.

1 "[T]he attempt to develop law and a peaceful world order constitutes a necessary element in United States policy. These are essential goals of the United Nations as well." Statement by Dean Rusk (Mar. 7, 1967), 56 DEP'T STATE BULL. 602 (1967). See also Charter Day Address by Dean Rusk (Mar. 20, 1961), 44 id. 516-17 (1961); D. Rusk, The Winds of Freedom 301 (1963); The Role of International Law in World Affairs, Address by Dean Rusk (Nov. 17, 1964), 51 DEP'T STATE BULL. 802-03 (1964).
His many speeches on these subjects always struck a positive note, thus appealing strongly to people interested in world peace and order.

In 1965, when I had the pleasure of introducing him at the Annual Dinner of the American Society of International Law, I pointed out that Dean Rusk has listed four principal commitments of the United States in the field of foreign policy: to the United Nations, to the growth of law among nations, to freedom, and to economic and social advancement. As Dean Rusk said on that occasion, the United States seeks "a world of expanding human rights and well-being... a world of expanding international law." And he added: "If once the rule of law could be discussed with a certain condescension as a Utopian ideal, today it becomes an elementary practical necessity. Pacta sunt servanda now becomes the basis for survival." In the same speech he pointed out that the "'common law of mankind'... is growing as the world shrinks" and that the rapid "pace of discovery and invention forces us to reach out for international agreement, to build international institutions, to do things in accordance with an expanding international and transnational law."

In the last few years, Dean Rusk and I have been again working together to build international institutions in the complex area of the law of the sea, trying to develop a new international regime for the two-thirds of the surface of the earth which is covered by oceans. And in his prophetic fashion already in 1962 Dean Rusk listed among the problems of the 21st Century: desalinization of ocean waters; enabling deserts to bloom; cultivation of crops in the sea; and the mining of mineral nodules on the ocean floor.

Coming now to the main subject of my Sibley lecture, I plan to consider here the ways by which the international community is shaping international law, and in particular the methods used by

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3 See, e.g., Charter Day Address by Dean Rusk, supra note 1, at 517-18; D. Rusk, supra note 1, at 257, 267; Remarks by Dean Rusk (Dec. 1, 1965), 53 DEP’T STATE BULL. 982-83 (1965); The Political Future of the Family of Man, Address by Dean Rusk (Nov. 14, 1967), 57 id. 737-38 (1967).


5 Address by the Honorable Dean Rusk, Secretary of State (April 24, 1965), id. at 247, 248-49, 254, 255 [hereinafter cited as Address by Dean Rusk (April 24, 1965)].

6 From 1974 to 1976 Dean Rusk was the chairman of the Advisory Committee on the Law of the Sea, and Louis B. Sohn was a member of that Committee, with special responsibility for the settlement of law of the sea disputes.

the United Nations to build—to use another one of Dean Rusk's favorite phrases—"a decent world order."  

There is no special mystery about the shaping of international law. The forces that help to shape that legal system are not too different from those which influence the development of the law in the United States, whether on the federal or the state level. In each community, local, national or international, there are some groups which exercise special influence on the legal process, there are others who have some amount of influence, and then there is the vast majority which can exercise its influence only periodically through the electoral process. In the international community there are a few States which play an important role in the shaping of international law, there are some twenty or thirty others which act as leaders of various groups, and there are more than one hundred States which simply follow their leaders to protect regional or other special interests. Again, as in the national domain, this is not as simple as it may appear. The major powers seldom act together, are often on the opposite sides of a dispute, and each of them tries to build a coalition of various groups to achieve the necessary law-making majority. Similarly, the interests of other countries often transcend ordinary regional or other special bonds, and to achieve a goal their leaders need to form temporary coalitions which soon split when new issues arise. Sometimes the dominant factor is political or ideological, on other occasions it is economic or even cultural. The predominance of the English and French languages in many countries of Africa, Asia, and the Caribbean, together with various cultural and educational links with London and Paris, are not negligible factors in international affairs.

While the main lines of confrontation are between the capitalist or semi-socialist West and the communist East, and between the developed North and the developing South, there are many other possible lines of division. For instance, in the law of the sea there is a split between major maritime powers (including not only the United States, the Soviet Union, and Japan, but also Greece, Liberia, and Panama) and the coastal States (including not only most Latin American States but also Canada, Norway, and Iceland); and, in addition, between the coastal States and the landlocked and geographically disadvantaged States (such as Bolivia, Nepal, and Singapore). There are also other special-interest groups, such as

* Address by Dean Rusk (April 24, 1965), supra note 5, at 255.
archipelagic States, countries bordering on international straits, and small island States. Superimposed on these groups are divisions based on regional lines, the various economic interests (e.g., fishing, mining, or oil exploitation), and such ideological factors as the support for or opposition to the New International Economic Order.9

The shaping of international law is complicated further by the sudden growth of the international community. It was easier to codify international law when at the first Hague Conference in 1899 most participants were from Europe, and invitations were extended to only a few States from other parts of the world.10 The inclusion of a larger number of non-European States in the Second Hague Conference led to various difficulties and prevented an agreement on an international court.11 Only a few States, mostly in Eastern Europe, were added to the international community during the League of Nations period, and the United Nations started with merely fifty-one members. But during the last twenty years the membership of the United Nations almost tripled, and there are in it 149 States, leaving only a few States outside.12

One can compare this revolution in the structure of the international community with the addition of the Third Estate to the Bri-

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10 Only the following non-European States took part in that Conference: China, Japan, Mexico, Persia, Siam, Turkey, and the United States. The PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, THE CONFERENCE OF 1899, 1-7 (J.B. Scott ed. 1920).

11 In addition to those who took part in 1899, the following non-European States participated in the 1907 Conference: Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay, and Venezuela. The PROCEEDINGS OF THE HAGUE PEACE CONFERENCES, THE CONFERENCE OF 1907, 2-15 (J.B. Scott ed. 1920). As the list indicates, all the new participants were Latin American States. With respect to the proposed Court of Arbitral Justice, see M.O. HUDSON, The PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, at 80-84 (1943); Myers, The Composition of the Court, [1913] Proc. of the Am. Soc'y for Judicial Settlement of Int'l Disputes 153-71 (1914).

12 The following States are not members of the United Nations: Switzerland, the two Koreas, and such small States as Liechtenstein, San Marino, and Monaco. In addition to Rhodesia and Namibia, there are more than twenty non-self-governing territories, several of which are likely to become members of the United Nations. Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 30 U.N. GAOR, Supp. (No. 23), U.N. Doc. A/10023/Rev. 1 (1976).
tish and French Parliaments, to the profound changes brought by the British electoral reforms in 1832, or to the abolition of poll taxes and other voting restrictions and inequities in the United States. This enfranchisement of almost one hundred new States has certainly changed the balance of power in the forces which shape international law. Whichever factors one considers—number of States, population, or economic power—there has been a tremendous shift of power from the industrial West to the other parts of the world, especially the populous countries of Asia, the oil-rich countries of the Middle East, and the numerous countries of Africa. No group or even combination of groups can now dominate the law-making process; law can no longer be imposed on a dissenting group; and most problems have to be solved by patient negotiations leading to a broad consensus.

Consequently, it is important for all groups of countries, especially the older democracies of the West and all those small countries which can find protection from their powerful neighbors only in an adequate system of legal norms and institutions, to start paying more attention to the old and new ways of shaping international law.

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13 The Third Estate was the professional class ("probi viri") which in the 14th and 15th centuries became established as a separate order distinct from the lay and clerical nobility. In the feudal hierarchy, only the latter two groups were in direct correspondence with the monarch. In 1301 and 1302 Phillip the Fair of France summoned all three groups to give counsel. This is usually regarded as the beginning of the Estates General, the forerunner of the modern legislative assembly. For an account of the early development of the representative legislature in England and France, see 7 THE CAMBRIDGE MEDIEVAL HISTORY 665-95 (J.R. Tanner, C.W. Previté-Orton, Z.N. Brooke eds. 1932).


law. The first discovery one makes is that there is no international legislature, though there are some quasi-legislative processes. The situation is not very different from the old common law period, when the Parliament was more concerned with taxes and the privileges of the nobility and clergy than with legislating. The international system still depends primarily on sources of customary law, the interplay between the practice of States and the contributions of courts and jurists. While the rules of international law can be traced to ancient China, India, Middle East, and Greece, and many rules were developed by the practice of the multitudinous medieval countries, especially the Italian city-states, these rules were first systematized in the 17th and 18th centuries by several ingenious jurists, who wove together the practice of ancient and modern States as described in the Bible, classical histories, and medieval and early modern chronicles. Other jurists started collecting international treaties and diplomatic correspondence; and at the beginning of the 19th century such eminent jurists as Chief Justice John Marshall, Justice Joseph Story, and Sir William Scott (later Lord Stowell) started enunciating principles of international law, mostly taking for granted the rules concocted by the writers of the preceding period, from Grotius to Vattel.

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17 See, e.g., Hsu Ch’uan-Pao, Le Droit des Gens et la Chine antique (1926); W. Martin, Traces of International Law in Ancient China (Bound reprint, source unidentified, 1881); P. Bandyopadhyay, International Law and Custom in Ancient India (1920); S. V. Viswanatha, International Law in Ancient India (1925); G. Kestemont, Diplomatique et Droit International en Asie Occidentale, 1600-1200 av. J.C. (1974); W. Huss, Untersuchungen zur Aussenpolitik Ptolemaos’ IV (1976); C. Phillipson, The International Law and Custom of Ancient Greece and Rome (1911); V. Martin, La Vie Internationale dans la Grèce des Cités (1940).

18 See A.P. Sereni, The Italian Conception of International Law 3-124 (1943).

19 See, e.g., H. Grotius, De Jure Belli ac Pacis, lib. II, cap. XXI, § V. In a 3-page discussion of one aspect of the rights of suppliants, he cites the books of Deuteronomy, Exodus, and Kings; Cicero, Antiphon, Marcus Aurelius, Tacitus, Philo, and Plutarch; Frederickus’ Chronicle of King Pepin, Concilia Galliae, Aimon, Leunclavius’ Turkish History, and Procopius’ Gothic War; and Mariana, Simler, and Camden—among others.


22 While Chief Justice Marshall tended more toward the statement of general principles,
also a proliferation of international arbitral tribunals which also relied mostly on the law as transmitted to them by the various authors. New writers added national and international decisions to the sources of international law from which they derived the principles of international law; and slowly a new hierarchy of these sources developed, giving higher status to decisions of international and domestic tribunals and slowly diminishing the importance of the writings of eminent jurists. The second half of the 19th century without citation of specific authority for each—as does the International Court of Justice—the arguments of the counsel in the reports of cases before him are full of references to Vattel and other eminent authors. See B. Ziegler, The International Law of John Marshall 15-23 (1939). Among Chief Justice Marshall’s opinions dealing with questions of international law are those in the following cases: Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804); Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1812); United States v. Bevans, 16 U.S. (3 Wheat.) 336 (1818); and The Antelope, 23 U.S. (10 Wheat.) 66 (1825). In the latter, Marshall found that the slave trade was not criminal according to the law of nations, even though most nations prohibited it. Cf. Justice Story’s opinion in United States v. The Schooner La Jeune Eugénie, 26 F. Cas. 832 (1st Cir. 1822) (No. 15, 551), in which he comes to the opposite conclusion. Other cases involving international law decided by Justice Story include: The Ann, 1 F. Cas. 926 (1st Cir. 1812) (No. 397); United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); and The Apollon, 22 U.S. (9 Wheat.) 362 (1824). Among Sir William Scott’s opinions of note on international law are: The Young Jacob and Johanna, 1 C. Rob 20 (Adm. 1798); the two cases of The Twee Gebroeders, 165 Eng. Rep. 422 and 485, (Adm. 1800 and 1801); The Anna, 165 Eng. Rep. 809, (Adm. 1805); and Le Louis, 165 Eng. Rep. 1464 (Adm. 1817). For further analysis of the opinions of Justice Story and Sir William Scott, see respectively, Dunne, Joseph Story, 77 Harv. L. Rev. 240 (1964), and E.S. Roscoe, Lord Stowell, His Life and the Development of English Prize Law (1916).

2 See, e.g., (1) Iroquois River Boundary (Great Britain-United States), Arbitration under the Treaty of Ghent of 1814 (1822); 1 J.B. Moore, History and Digest of the International Arbitrations to which the United States Has Been a Party 166 (1898) [hereinafter cited as Moore]; H. La Fontaine, Pasichrie Internationale 16 (1902) [hereinafter cited as La Fontaine]; 1 A. de Lapradelle & N. Polits, Recueil des Arbitrages Internationaux 314 (1905) [hereinafter cited as Lapradelle]; (2) The John S. Bryan (Brazil-United States), Commission under the Agreement of 1842 (1843), 5 Moore 4613; (3) Portendick Blockade (France-Great Britain), Arbitration under Declaration of 1842 (1843), La Fontaine 25, 1 Lapradelle 525, 5 Moore 4936, 42 Brit. For. St. Papers 1377 (1864); (4) The Enterprise, the Hermosa, and the Creole (Great Britain-United States), Arbitrations under the Convention of 1853 (1855), N.G. Upham, Report of Decisions of the Commission of Claims ... Between the United States and Great Britain 187, 238, 241 (1856); (5) The Faber Case (Germany-Venezuela), Commission under the 1903 Agreement (1903), J.H. Ralston and W.T.S. Doyle, Venezuelan Arbitrations of 1903, at 600 (1904); 10 R. Int’l Arb. Awards 438.

21 Concerning the role of international decisions as a source or evidence of international law, see 1 J.B. Moore, International Adjudications: Ancient and Modern: Modern Series lxxviii-lxxxiii (1929). The following list of sources of international law appears in H. Wheaton, Elements of International Law 23-27 (8th ed. R. Dana ed. 1866): text writers, translators, ordinances and prize tribunals of particular States, adjudications of international tribunals, written opinions of jurisconsults to their own governments. Compare this list with the analysis in Pollock, The Sources of International Law, 2 Colum. L. Rev. 511-24 (1902). Pollock gives a featured place to custom, multilateral agreements, and decisions of internа-
saw a new phenomenon, the development of international rules by international conferences which adopted multilateral treaties codifying certain areas of the law and sometimes establishing international institutions to assist in their implementation. This process culminated in the Hague Conferences of 1899 and 1907 which codified both the rules of war and the procedures for the peaceful settlement of international disputes. The process of codification of international law was continued by the League of Nations, which arranged for the preparation of many important international conventions. But its largest effort, the Hague Conference of 1930, was only a partial success, codifying the rules of international law relating to nationality, but failing to reach agreement on rules concerning the responsibility of States for injuries to aliens and on the regime of the territorial sea. The United Nations institutionalized the process of codification; the General Assembly established a permanent International tribunals; he regards text-writers only as sources of evidence of State practice. In an 1899 case, Justice Gray said that to determine international law "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and as evidence of these, to the works of jurists and commentators." The Paquete Habana, 175 U.S. 677, 700 (1899) (emphasis added). Cockburn, C.J., in the 1905 case of the Queen v. Keyn, stated that "writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law." [1876-1877] 2 Ex. D. 63, 202 (1876). Accord, West Rand Central Gold Mining Co. v. The King, [1905] 2 K.B. 391, 401-08 (1905).

See 1 M.O. Hudson, International Legislation xviii-xxxvi (1931); and see generally R.L. Bridgman, The First Book of World Law (1911).

For an analysis of the work of the Conferences, together with texts of the conventions agreed and other documents, see J.B. Scott, The Hague Peace Conferences of 1899 and 1907 (1909).


national Law Commission for the codification and progressive development of international law; and the Commission after a careful survey of the whole field of international law, prepared a priority list, and started preparing comprehensive conventions covering one area after another. Among the most successful accomplishments were the conventions on diplomatic relations, consular relations, and the law of treaties. The Commission’s preparatory work on the law of the sea led to the adoption of four conventions by the First Law of the Sea Conference in 1958, but the Second Conference on that subject in 1960 could not agree on the limits of the territorial sea and of fishing jurisdiction. An imaginative 1967 initiative by Ambassador Arvid Pardo of Malta led to the establishment of a special committee for the preparation of rules which could govern the exploitation of the resources of the deep seabed and ocean floor (the so-called “manganese nodules”), which were considered as a

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“common heritage of mankind.” To that task was soon added the job of preparing a code on the law of the sea, revising drastically some of the rules codified only a few years before (in 1958). The Third Conference on the Law of the Sea started meeting in 1973, and in 1977, after six sessions, reached a large measure of agreement on most law of the sea subjects and on a complex system for settling international disputes which may arise with respect to the interpretation and application of this codification. But big disputes still persist with respect to the problem which led to this new codification effort, that is, the deep seabed mining. In this area, there is a confrontation between the industrial countries which wish to obtain almost automatic access to the minerals of the seabed, and the developing countries which are primarily interested in ensuring that an international “Enterprise” will exploit these resources for the benefit of the developing countries and that the mining enterprises of the developed countries will be somehow subordinated to an international Authority dominated by the developing countries. Thus, this codifying venture may still founder on this undersea rock, but one should not neglect the fact that through an elaborate negotiating process, experimenting with the new methods for preparing international codificatory instruments, an international assembly of some 150 States has practically reached a consensus on more than 300 articles affecting many vital interests—maritime commerce, national and international security, fishing, protection of the environment, scientific research, and the settlement of international disputes. While an important part of the glass is empty, the glass

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37 ICNT, supra note 36, Part XI and Annexes II and III. See also Statement by Ambassador Elliot L. Richardson (July 20, 1977), UNITED STATES MISSION TO THE UNITED NATIONS, PRESS RELEASE USUN-57(77).
is three-quarters full, and the interests protected by the agreed articles are of crucial importance to both the United States and many other States.

Apart from this sophisticated and complex process of codification, the old methods of shaping international law still persist. The number of bipartite and multipartite treaties concluded since 1945 probably exceeds the number of treaties concluded in the previous 3000 years. Many new fields are thus covered by a network of international agreements, and several hundreds of international organizations watch over the execution of many of them. The earlier diplomatic practice of States has become more accessible with the publication of various digests; but with the advent of a hundred new States, the pace of international negotiations has grown beyond the capacity of many foreign offices to handle them, much less to document them properly. The task of lawyers trying to keep abreast of current practice of States has become extremely difficult, and each year the situation is growing worse. At the same time, the number of books and articles on international law has greatly multiplied, without shedding, however, enough light on the new principles which seem to be developing.

Similarly, the increasing interdependence of nations, the greater mobility of the world's population, and the growth in transnational corporations and transactions, have brought more international problems to national courts, which have found it rather difficult to deal with many complex international issues, having to rely quite often on not completely unbiased advice of the executive branches of national governments. On the other hand, there has been a

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34 By October 1973, 13,477 treaties had been registered or filed and recorded with the United Nations. There are perhaps as many treaties which have not been registered or filed. The League of Nations registered only 4,834 treaties. By the time it is complete, the Consolidated Treaty Series, being compiled by Professor Clive Parry, will probably contain between 15,000 and 17,000 instruments. That series will cover the period 1648 to 1920.

Dean Rusk noted that in 1965 the United States was a party to 4,300 treaties and international agreements, of which "three-fourths . . . were signed in the last 25 years." Rusk, The Unseen Search for Peace, 53 Dept' State Bull. 690, 693 (1965).


36 See, e.g., J.B. Moore, A Digest of International Law (1906); G.H. Hackworth, Digest of International Law (1940-1944); M.M. Whiteman, Digest of International Law (1963-1973); C. Parry, A British Digest of International Law (1965-1967); A.C. Kiss, Répertoire de la Pratique Française en Matière de Droit International Public (1962-72).

37 See Jessup, Has the Supreme Court Abdicated One of its Functions? 40 Am. J. Int'l L. 168-72 (1946).
decrease in the number of cases submitted to international courts and tribunals, except in Europe where specialized courts have coped quite effectively with such difficult issues as European economic integration and human rights. In the last decade, the International Court of Justice has had only a few cases, and there have been but few international arbitrations.

Nevertheless the contribution of the Court to the shaping of international law is an important one. In several recent cases it has emphasized the application of equitable legal principles, and to the dismay of some dissenting judges it has arrogated to itself "a creative power," becoming a "begetter" of new ideas and pointing the way in which the law should be developed. Similarly, some recent arbitrations have helped to clarify, or develop, important rules of international law.

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12 Official reports of the Court of Justice of the European Communities are contained in Reports of Cases Before the Court (Luxembourg, English ed. since 1962). Common Market Law Reports (Benenson, Blom-Cooper, and Valentine ed. since 1963) also contain these cases, as well as selected cases from municipal courts. See also D. Valentine, The Court of Justice of the European Communities (1965); E. Wall, The Court of Justice of the European Communities (1966); Vie Congrès International de Droit Européen, La Jurisprudence Européenne Après Vingt Ans d'Expérience Communautaire (1976). Official reports of the European Court of Human Rights are contained in Publications of the European Court of Human Rights (Series A, Judgments and Decisions; Series B, Pleadings, Oral Arguments and Documents) (Strasbourg). A separate volume is put out for each case. See also A. H. Robertson, Human Rights in Europe (1963); K. Vasak, La Convention Européenne Des Droits De L'Homme (1964); Digest of Case-Law Relating to the European Convention on Human Rights, 1955-1967 (1970).

13 Since 1922 the International Court of Justice (and its predecessor the Permanent Court of International Justice) have rendered the following numbers of final judgments and advisory opinions in each decade: 1922-30, thirty-six; 1931-40, thirty-two; 1941-50, seven (all between 1948 and 1950); 1951-60, twenty; 1961-70, five; 1971-77, six. As to the number of recent arbitrations see Sohn, Report on International Arbitration, [1966] Int’l L. Ass’n, Rep. of the 52d Conf. 323, 330-33 (1967).

14 E.g., "[I]t is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles." North Sea Continental Shelf, [1969] I.C.J. 3, 47. See also Fisheries Jurisdiction (United Kingdom v. Iceland), [1974] I.C.J. 3, 30.

15 Judge Ignacio-Pinto, [1974] I.C.J. 35, 37-38. He also made the following statement in his dissenting opinion in the Fisheries Jurisdiction case: "Furthermore, it causes me some concern also that the majority of the Court seems to have adopted the position . . . in the present Judgment with the intention of pointing the way for the participants in the Conference on the Law of the Sea . . . . The Court here gives the impression of being anxious to indicate the principles on the basis of which it would be desirable that a general international regulation of rights . . . should be adopted." Id. at 37.

16 E.g., Delimitation of the Continental Shelf (France v. United Kingdom), mimeographed decision (1977) (to be published in Am. J. Int’l L.). The Court here found that the so-called "natural prolongation" rule enunciated in the North Sea Continental Shelf case, supra note 44, was limited to cases where it produced an equitable delimitation. Decision, paras. 192-95.
Most new countries prefer to deal with their disputes through regional and United Nations channels. When one of them has a dispute with a major power, it prefers to bring it before the United Nations, where it can more easily obtain support from other countries in its region or even from the whole group of developing countries. While in the past it was in the interest of smaller States to channel their disputes to international tribunals and have them decided on the basis of law, today the major powers may find it safer to go to a court rather than a political body dominated by an unfriendly majority. At the same time, the new States are reluctant to go to the International Court of Justice because they fear, not completely unjustifiably, that the Court is too conservative and does not understand the "new" international law which is being rapidly developed by new methods more attuned to the rapidly changing requirements of the modern age.47

What are these new means? It is generally accepted that the Charter of the United Nations is in fact the constitution of the international community and as such prevails over other international agreements or domestic laws.48 The application of such a principle in the United States would require giving the Charter primacy even over later federal legislation, and for the moment no direct confrontation has arisen. Issues have been raised, however, over some decisions of United Nations bodies, e.g., in the Rhodesian chrome case,49 and in several instances over the self-executing char-

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47 These States were particularly dissatisfied with the judgment or opinion in the following International Court of Justice cases: South West Africa, Second Phase, [1966] I.C.J. 3; Fisheries Jurisdiction (United Kingdom v. Iceland; Federal Republic of Germany v. Iceland), [1974] I.C.J. 3, 174; Western Sahara, [1975] I.C.J. 12.

48 The Charter is thus the cornerstone of international jus cogens, which was defined by Article 53 of the Vienna Convention on the Law of Treaties of 1969 as a peremptory norm of international law "from which no derogation is permitted." U.N. Conference on the Law of Treaties, Official Records, Documents of the Conference 296, U.N. Pub. E.70.V.5. The Charter itself provides that the obligations under it prevail over "obligations under any other international agreement." U.N. CHARTER art. 103. Article 27 of the Vienna Convention on the Law of Treaties confirms the principle recognized by several international tribunals that a "party may not invoke the provisions of internal law as justification for its failure to perform a treaty." On the need to reconsider the United States rule that a later law prevails over an earlier treaty, see W. McCuIIe, WORLD LEGAL ORDER: POSSIBLE CONTRIBUTIONS BY THE PEOPLES OF THE UNITED STATES (1969).

acter of United Nations instruments.\textsuperscript{50}

The Charter of the United Nations, like the Constitution of the United States, is written in broad and general language requiring constant interpretation. We have seen that, depending on current trends and the mood of the Supreme Court, such interpretation can either broaden or narrow the scope of the original instrument. Similarly, the organs of the United Nations can by their interpretation of the Charter broaden the scope of the United Nations, especially when there is unanimous agreement on the subject, or at least no open disagreement. A Committee at the 1945 San Francisco Conference pointed out that "if an interpretation made by any organ of the Organization or by a committee of jurists is not generally acceptable it will be without binding force."\textsuperscript{31} The United Nations has been willing to proceed on the basis of the corollary principle that an interpretation which is generally acceptable (i.e., was adopted unanimously, or without any negative vote, or without a vote, by consensus) is binding on all the Members. The records of the United Nations show that many resolutions have been adopted in such a manner and thus constitute binding interpretations of the Charter. While most of these resolutions were ephemeral or dealt with subjects of only limited relevance to Charter interpretation, some of them constitute important extensions of the Charter.

Orders Nos. 11322 and 11419, 3 C.F.R. § 606 and § 737 (1968), reprinted in 22 U.S.C. § 287c. However, in 1971 Congress passed the so-called "Byrd Amendment" to the Strategic Materials Stock Piling Act, 50 U.S.C. §§ 98-98h. The Byrd Amendment had the effect of removing the prohibition on the importation of Rhodesian chrome. On February 28, 1972, the Security Council passed another resolution, reaffirming its earlier action on the subject, and stating that any legislation by any State which permitted the importation of certain Southern Rhodesian commodities "including chrome ore, would undermine sanctions and would be contrary to the obligations of States." S.C. Res. 314, 28 U.N. SCOR, Resolutions, at 7, U.N. Doc. S/INF/28 (1973). A group of persons brought an action against the Secretary of the Treasury to enjoin such importation and require seizure of any contraband. The action was dismissed by the United States District Court. On appeal, the court (after an initial finding that appellants had standing) found that "Congress can denounce treaties if it sees fit to do so, and there is nothing the other branches of government can do about it. We [the court] consider that this is precisely what Congress has done in [the Byrd Amendment]." Diggs v. Schultz, 470 F.2d 461, at 466 (D.C. Cir. 1972), cert. denied, 411 U.S. 931 (1973).

\textsuperscript{50} In Sei Fujii v. California, 38 Cal. 718, 242 P.2d 617 (1952), the court found that, although the Charter was a treaty and thus the law of the land, it was not self-executing. For discussion of this and similar cases, some of which took a different point of view, see L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 944-47 (1973). Concerning the so-called "Bricker Amendment" to the Constitution, which would have limited the domestic effect of international agreements, see id. 948-71.

Thus after eight years of in-depth discussions in the General Assembly and its special committee on the subject, the General Assembly adopted unanimously in 1970 a "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations," which contained a far-reaching interpretation of the fundamental principles embodied in Article 2 of the Charter. For instance, the additional principles relating to the prohibition of the use of force make it clear that states have the duty to refrain from using force not only across existing international boundaries, but also across international lines of demarcation; that acts of reprisal involving the use of force are included in the prohibition and that

> [e]very State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

Similarly, a new dimension was added to the principle of nonintervention, by the inclusion in the Declaration of such principles as the following:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

> No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.

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53 Id. at 122-23.
54 Id. at 123. An almost identical text was previously included in the Declaration on Inadmissibility of Intervention, approved by Resolution 2131 of the 20th General Assembly, December 21, 1965, which was also adopted without a negative vote, but with several important abstentions in the First Committee vote. 20 U.N. GAOR, Supp. (No. 14) 11-12, U.N. Doc. A/6014 (1966). See also id., 3 Annexes (Agenda Item 107), at 9.
From the point of view of the new Members from Africa and Asia the value of the Declaration was enhanced by embodying in it various principles relating to self-determination. Among others, the Declaration includes the following principles on that subject:

Every State has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.55

It is noteworthy that the General Assembly declared further that the "principles of the Charter which are embodied in this Declaration constitute basic principles of international law;" and appealed to all States, including, thus, non-members, "to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles."56

This is but one important example of the legislative activity of the General Assembly, leading to the creation of new international law applicable to all States. Similar action, through unanimously approved declarations, was taken by the General Assembly in such important areas as outer space57 and the seabed.58 One could include in this category also the resolution approving a detailed definition of aggression, a result of some fifty years of codificatory efforts.59

All these declarations are not ordinary international treaties or conventions and were not subject to ratification. Nevertheless, there is a wide consensus that these declarations actually established new rules of international law binding upon all States. This is not treaty-making but a new method of creating customary international law. As was noted before, historically, customary international law was to a large extent created by eminent international jurists who, in general or special treatises, collected laboriously many diplomatic

55 G.A. Res. 2625, supra note 52, at 124.
56 Id.
notes, national and international judicial documents, and the opinions of other scholars, with respect to particular rules of international law. If there was a wide measure of agreement, or at least no important disagreements, a national or international decision-maker usually concluded that a new rule had been established and by his own decision added further evidence that the rule existed. The process usually took a long time, because similar cases do not often arise in international affairs, and the access to official documents is usually delayed for many years. It often required some important international litigation for both the Foreign Offices concerned and outside scholars to get interested in a particular rule to the extent necessary to collect from various archives the relevant practice.

In the United Nations this process has been expedited. By addressing notes to its Member Governments, the United Nations can obtain relevant information from their files and their opinions about the need for and the content of the new rules to be adopted. If additional views of Governments need to be obtained, modern communication techniques allow rapid transmission of such views or of new negotiation instructions. The existence in New York of permanent missions of almost all States of the world permits a constant exchange of views and speeds up the negotiation process. A draft thus agreed upon can be transmitted quickly to the Foreign Ministries, and their final approval can be obtained before final action. In the case of each United Nations declaration it took several years of preliminary discussions, both in the Assembly itself and in a special committee, as well as a few months of hard, last-minute negotiations to remove the remaining obstacles, with repeated calls to Foreign Ministries for changes in instructions. Once, however, the text of a declaration was agreed upon, all the countries concerned were willing to adopt the new principles embodied therein without further formalities. Thus the United Nations has made possible the creation of "instant international law." Many traditional international lawyers have not reconciled themselves yet to this new approach and some legal advisers of Foreign Offices still like to raise doubts about the true nature and effect of such declarations. But it is quite obvious that most States have found this new procedure quite useful and are willing to apply it whenever they are confronted with important issues of interpreting the basic rules of the Charter

of the United Nations or of developing new law for new areas made accessible by modern science and technology. In a rapidly changing world the United Nations has found a method, albeit restricted by the rule of unanimity or quasi-unanimity, to adapt the principles of its Charter and the rules of customary international law to the changing times with an efficiency which even its most optimistic founders did not anticipate.

A special problem has arisen in the field of human rights. The Charter of the United Nations contains a variety of provisions on that subject. In particular, in accordance with Article 55 of the Charter, the United Nations has the duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." In addition, Article 56 contains a "pledge" by all Members of the United Nations "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55." While these provisions are general, nevertheless they have the force of positive international law and create basic duties which all Members must fulfill in good faith. The International Court of Justice has declared that "to establish . . . and to enforce distinctions, exclusions, restrictions and limitations based on grounds of race, colour, descent or national or ethnic origin which constitute a denial of fundamental human rights is a flagrant violation of the purposes and principles of the Charter."

The generality of the provisions of the Charter led, however, to contentions that it could not be applied to concrete situations until the human rights and fundamental freedoms specified in the Charter had been more specifically defined in an International Bill of Rights. Consequently, one of the first tasks undertaken by the United Nations was the preparation of that instrument, as one of the first tasks of the newly born Congress of the United States was to approve the first ten amendments to the Constitution containing a comprehensive bill of rights. The start was made in 1948, with the adoption by the General Assembly of the Universal Declaration of Human Rights, which provided a comprehensive list of basic rights and freedoms. At the beginning there was some doubt whether the

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61 Other provisions on human rights are contained in the preamble to the Charter, and in its Articles 1, 13, 62(2), 68, 73, 76.
Declaration could be considered as binding. While some delegates claimed that the Declaration merely set up a common standard which the peoples of the world should strive to achieve, others expressed the view that the Declaration stated explicitly what human rights Member States already pledged themselves in the Charter to observe, and that any violation of the Declaration was a violation of the principles of the Charter. As the Declaration was adopted unanimously (with eight abstentions), it constituted an authoritative interpretation of the Charter; and various organs of the United Nations did not hesitate to contend that by failing to observe a provision of the Declaration a Member had violated Articles 55 and 56 of the Charter. The Declaration deprived any Member accused of a violation of a human right specified in the Declaration of the defense plea that it did not know that this particular right was embraced by the Charter obligation to observe human rights.

The practice of the United Nations confirms this conclusion. Even States which originally expressed doubts about the legal force of the Declaration have not hesitated to invoke it and to accuse other States of having violated their obligations under the Declaration. The United States, for instance, invoked the Declaration in the so-called Russian Wives Case even before the ink on the Declaration was dry. The General Assembly adopted a resolution on the subject, in which it declared that the Soviet measures preventing Russian wives from leaving the Soviet Union with their foreign husbands were “not in conformity with the Charter;” it cited Articles 13 and 16 of the Declaration in support of this conclusion.

The Soviet Union, on the other hand, has voted for most of the resolutions relating to southern Africa in which the Declaration was invoked by the General Assembly. To this group belong several resolutions relating to the treatment of people of Indian and Pakistani origin in South Africa, the administration of South West

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67 3(1) U.N. GAOR, C.6 (137th mtg.) 735-39 (1948).


Africa,\textsuperscript{70} and the policies of apartheid in South Africa.\textsuperscript{71} The Security Council requested South Africa "to cease forthwith its continued imposition of discriminatory and repressive measures which are contrary to the principles and purposes of the Charter and which are in violation of its obligations as a Member of the United Nations and of the provisions of the Universal Declaration of Human Rights."\textsuperscript{72}

The duty of all Members, and indeed of all States, whether Members or not, to comply with the Universal Declaration was confirmed by two later Declarations which were also adopted unanimously (the first one with nine abstentions, the second one with one Member not participating in the vote). Thus the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples proclaimed that all States "shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights" and the new Declaration.\textsuperscript{73} Similarly, the 1963 Declaration on the Elimination of All Forms of Racial Discrimination contained a provision that every State "shall fully and faithfully observe . . . the Universal Declaration of Human Rights" and the two other Declarations.\textsuperscript{74}

Taking these developments into account, the unofficial Assembly for Human Rights, which met in Montreal in March 1968, stated that the "Universal Declaration of Human Rights constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become a part of customary international law."\textsuperscript{75} In the Declaration of Teheran, the official International Conference on Human Rights, which met at Teheran in April-May 1968, reached a similar conclusion and proclaimed that the "Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community."\textsuperscript{76} The General

Assembly of the United Nations in December 1968 endorsed the Proclamation of Teheran "as an important and timely reaffirmation of the principles embodied in the Universal Declaration of Human Rights."\(^{77}\)

As one of the chief framers of the Declaration, Charles Malik (Lebanon), pointed out on its twenty-fifth anniversary, many "United Nations resolutions—maybe hundreds of them—based their arguments jointly on the Charter and the Declaration, and mention the two in the same breath." He also noted that "when people anywhere search for any authoritative listing of human rights and fundamental freedoms that will serve as a 'standard of achievement' for themselves and their cultures, they can find nothing of the depth, the authoritativeness and comprehensiveness of the Universal Declaration."\(^{78}\)

This excursion into the human rights field, which can be multiplied in other areas, is perhaps sufficient to show that modern international law can grow not only through ordinary practice of States


\(^{78}\) Conference of Non-Governmental Organizations in Observance of the 25th Anniversary of the Universal Declaration of Human Rights, Report [of the] Human Rights Committee 10 (1973). When the Secretariat of the United Nations was requested by the Commission on Human Rights in 1962 to give an opinion regarding the difference between a "declaration" and a "recommendation" as far as the legal implications were concerned, it replied as follows [E/CN.4/L.610; 34 U.N. ESCOR, Supp. (No. 8) 15, U.N. Doc. E/3616/Rev. 1 (1962)]:

In United Nations practice, a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration of Human Rights. A recommendation is less formal.

Apart from the distinction just indicated, there is probably no difference between a 'recommendation' and a 'declaration' in United Nations practice as far as strict legal principle is concerned. A 'declaration' or a 'recommendation' is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a 'declaration' rather than a 'recommendation.' However, in view of the greater solemnity and significance of a 'declaration,' it may be considered to impart, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it. Consequently, in so far as the expectation is gradually justified by State practice, a 'declaration' may by custom become recognized as laying down rules binding upon States.

In conclusion, it may be said that in United Nations practice, a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected.
but also by this extraordinary method of unanimous declarations which either immediately, or in the course of time, become binding international law, as soon as the international community has accepted them as such. Having thus become a part of customary international law they are even binding on non-Member States, as some of these documents have expressly proclaimed.

One may perhaps dare to go even further. While there is an increasing agreement on the binding force of instruments proclaiming general principles implementing the Charter, can one consider decisions of the Security Council and the General Assembly as binding when they are rendered in quasi-judicial or executive capacity rather than the quasi-legislative one discussed previously? Putting it more precisely, as the Supreme Court by its decisions not only interprets law but in fact often creates it or drastically modifies it, can the Security Council or the General Assembly in some circumstances create law by establishing a line of precedents in a series of concrete cases? There was never any doubt that certain resolutions of these organs have a binding effect. This is particularly true with respect to the decisions of the Security Council relating to enforcement measures under Chapter VII of the Charter. In some cases States have contested the binding character of other decisions of the Security Council, especially those made under the provisions of Chapter VI of the Charter relating to international disputes and dangerous situations.\(^9\) The International Court of Justice laid these doubts to rest in its 1971 Namibia opinion where it said:

> It has been contended that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII of the Charter. It is not possible to find in the Charter any support for this view. Article 25 is not confined to decisions in regard to enforcement action but applies to “the decisions of the Security Council” adopted in accordance with the Charter. Moreover, that Article is placed, not in Chapter VII, but immediately after Article 24 in that part of the Charter which deals with the functions and powers of the Security Council. If Article 25 had reference solely to decisions of the Security Council concerning enforcement action

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under Articles 41 and 42 of the Charter, that is to say, if it were only such decisions which had binding effect, then Article 25 would be superfluous, since this effect is secured by Articles 48 and 49 of the Charter.80

Similarly, it is quite clear that some decisions of the General Assembly have "dispositive force and effect," as was noted by the Court in its opinion in the Certain Expenses of the United Nations Case.81 In addition, one might consider that a decision of the General Assembly which applies a principle of the Charter to a particular case is binding because the Charter is binding and the General Assembly "resolution merely gives effect to, and interprets, the Charter in a specific case," thus creating "a legal obligation."82 Even if it is only, from the formal point of view, a recommendation, it has behind it the force of the Charter.83

It has to be remembered also that recommendations of the General Assembly and the Security Council provide, on proper occasions "a legal authorization for Members determined to act upon them individually or collectively."84 Thus, if the General Assembly or the Security Council should recommend that Members take certain actions to ensure the performance by a State of its Charter obligations, that State cannot claim that these actions violate international law. There is a presumption that actions authorized by the appropriate organs of the United Nations are legal, unless it can be proven that the organ has acted ultra vires.

Even those recommendations of the General Assembly and the Security Council which cannot be considered binding in any of the senses discussed above, may nevertheless have certain important effects. A Member of the United Nations would not be fulfilling in good faith its obligations under the Charter, if it were simply to ignore such recommendations without adducing any plausible reasons for not giving effect to them. As Judge Lauterpacht has pointed out, a resolution recommending "a specific course of action creates some legal obligations" however "rudimentary, elastic and imperfect" it might be. The addressee State, "while not bound to accept

82 Statement by Mr. Belaunde (Peru) in the Hungarian Question, January 9, 1957. 11 U.N. GAOR (634th plen. mtg.) 838-38.
the recommendation, is bound to give it due consideration in good faith." Should it decide to disregard it, "it is bound to explain the reasons for its decision." A State

may not be acting illegally by declining to act upon a recommendation or series of recommendations on the same subject. But in doing so it acts at its peril when a point is reached when the cumulative effect of the persistent disregard of the articulate opinion of the Organization is such as to foster the conviction that the State in question has become guilty of disloyalty to the Principles and Purposes of the Charter.

Consequently, a State which

consistently sets itself above the solemnly and repeatedly expressed judgment of the Organization, in particular in proportion as that judgment approximates to unanimity, may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction.85

All these procedures depend for their binding effect on unanimity or, in more recent practice, consensus. This is made possible by the gradualness of the decision-making process. In a way consensus creeps slowly upon the negotiating parties. The matter is discussed in a variety of groups—subcommittees, working parties, contact groups,86 "friends of the Chairman"87—and documents are sent back and forth between the delegations and their home governments. There is constant give-and-take, various compromises are tried, and even those who are clearly in the minority get some of their formula-tions accepted. The emerging result is a truly collective product, and by the end it is difficult to identify who has contributed what part of the final text. A skillful chairman or rapporteur is a master at such blending of disparate views into a generally acceptable compromise. Consequently, it becomes difficult for any minority to completely reject the final product of this prolonged negotiating process. Consensus thus can be reached, at a moment carefully chosen by a watchful chairman. Once the gavel is brought down,

85 Id. at 118-20.
86 This device is used, for instance, in the Trade Development Board; see J. OF THE U.N. No. 77/167, at 2 (1977).
87 For the use of this device in various committees, see, e.g., J. OF THE U.N., No. 77/180, at 1, and No. 77/181, at 2 (1977).
some delegations may record a few objections in the minutes, without impairing the adoption of the generally agreed text.\textsuperscript{58} Some may claim that this process often brings forth a mouse, but in addition to the important declarations mentioned previously, this method has resulted in the adoption by the General Assembly of hundreds of resolutions and lately has become the favorite tool of the Security Council.\textsuperscript{59} Consensus is more a political than a legal concept; decisions arrived at by consensus have a stronger moral force and their execution is thereby facilitated.\textsuperscript{60} Sometimes, however, grave difficulties arise. For instance, in the law of the sea negotiations a variation of this procedure has resulted by now in general acceptance of more than 300 articles; but, because of an aberration in the negotiating process an agreement on the remainder of the text was aborted at the last minute of the sixth session.\textsuperscript{61}

In a way, over the years the pendulum has swung back from a process where a general consensus was required for the creation of a rule of international customary law and unanimity was required at international conferences, through a period of experimentation with various majority rules, back to consensus in the new quasi-legislative process.\textsuperscript{62} The new law, in order to be accepted by the nations of the world, must reflect the common opinion of mankind; and this is as it should be. It may not be really instant law, but in the long run this method is better and safer. A legal system thus shaped is likely to endure and to become, as it is said on the Great Seal of the United States, a new order of the ages, \textit{Novus Ordo Seclorum}, or—in Dean Rusk's phrase—"a decent world order."

\textsuperscript{58} For a similar analysis of the road to consensus, see Tammes, \textit{Decisions of International Organs as a Source of International Law}, 94 \textit{Académie de Droit Int'l, Recueil des Cours} 261, 287 (1958).


\textsuperscript{60} 2 H.G. Schermers, \textit{International Institutional Law} 328 (1972).

\textsuperscript{61} See Statement by U.S. Ambassador, Elliot L. Richardson, July 20, 1977, supra note 37.
